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Case #

UNITED STATES SUPREME COURT

Term October 1984

UNITED STATES v. PAUL HEANEY

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Due Process prohibits Government from submitting evidence which is false and requires Government to correct the record when false evidence has been submitted by a Government witness.
2. Due Process prohibits Government from refusing to disclose evidence which is prima facie exculpatory solely on its unilateral determination that the evidence is instead inculpatory.
3. Due Process extends to post conviction relief applications and requires that defendant have the opportunity to review Government file for exculpatory evidence when his trial counsel failed to review Government file and Government failed to disclose exculpatory evidence at pre-trial stage.

4. Evaluation of the effectiveness of defense counsel requires opportunity to demonstrate the evidence available but not used by him.

The parties to this proceeding are the United States and Paul Heaney

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JURISDICTION

Defendant invokes the judicial discretion of the United States Supreme Court to grant a Writ of Certiorari to review the Judgments of the Third Circuit Court of Appeals:

1. Entered on January 29, 1985, affirming the decision of the District Court denying Defendant's motion for a new trial or evidentiary hearing.

2. Entered on February 26, 1985, denying petition for rehearing.

3. Entered on April 19, 1985, denying Defendant's motion for leave to review Government's file for exculpatory deivdnce and stay of mandate.

The issuance of the Certified Judgment in lieu of formal mandate has been stayed until April 27, 1985, pendirg the filing of this petition for Certiorari and will be stayed thereafter until final disposition by the Supreme Court.

Since April 27 is a Saturday, the filing date is Monday, April 29, 1985.

FACTUAL BACKGROUND

During 1979 and 1980 the FBI was investigating John Spanos and William Carlson for bookmaking. Agents contacted Charles Edmund, President of Engineering and Refrigeration Co. (E & R) in March 1980 to alert him that employees of E & R might be defrauding E & R and gambling with the money.

The FBI advised that Paul Heaney, Controller, and Donald Malloy, V.P., Sales, might be involved.

Edmund claimed E & R could find nothing to confirm the FBI information. On May 14, 1980, Commercial Trust Co. advised E & R that its account with the bank was overdrawn by $12,060.91. A deposit that cleared the next day covered the overdraft.

Mr. Neil, E & R accountant, reviewed the E & R checking account and reported that a large number of checks were written

which did not appear to be in the normal numbering sequence. Checks for $331,950 were written in 1979, and $199,859 in 1980 and $56,150 in 1978. There were 112 out of sequence checks having a value of $597,959. Most were written to Paul Heaney; 17 with a value of $36,350 were written to Malloy.

Heaney was indicted and tried in the State Court of New Jersey for embezzling $500,000 from E & R. He defended that a plan was developed by Mr. Edmund, President, Mr. Malloy, V.P., Sales, and Mr. Reiner, V.P., Administration, to convert E & R checks into cash to be used by them for promotion of sales. Checks would be written out of the normal sequence. The checks would be cashed and the money turned over to Mr. Edmund or Mr. Malloy. Eventually checks would be written in the regular sequence to suppliers at inflated amounts to offset the out of sequence

checks. These offsetting checks would not be delivered, however, since they were merely to keep the checkbook in balance. Out of sequence checks were written on a regular weekly basis as funds were needed. These checks were cashed by Heaney and Malloy and the funds were accounted for and covered by the offsetting in sequence checks. The plan was used several years without problems until the FBI came across the E & R Checks that Heaney and Malloy cashed with Mr. Carlson. At the State trial Edmund and Reiner testified that Heaney was not authorized to issue or cash the out of sequence checks and they had no knowledge of them. Mr. Edmund and Mr. Reiner did, however, acknowledge that they participated in meetings at E & R almost daily to review the amount of cash the company had available in its checking account. Exhibit S 99 was discussed at length. This was a document prepared

under the supervision of Mr. Gillen, assistant controller, by one of his clerks. The title of the document was "Daily Cash Balance." It would start with the cash balance of the previous day, add all deposits and deduct all checks written that day. The daily cash balance was made up each day and given to Mr. Edmund, President. S 99 indicated the daily cash balance for May 14, 1980 as $131,884.96.

At the state trial, Exhibit S 102 was discussed at length. It was the bank statement for the E & R checking account which showed an overdraft of $12,060.91 on May 14, 1980. This was covered by a deposit the next day.

At the State trial Judge Caulkin observed at side bar that if Heaney can show that critical people at E & R had access to these documents (daily cash balance and bank statements) it would certainly tend to support the defense that

what he was doing was authorized. At the State trial Mr. Russell, defense counsel for Heaney, cross-examined the E & R officials extensively about the daily cash meetings and the daily cash report. Gillen testified that Mr. Edmund saw the daily cash report on a daily basis and knew the balance in the checking account. Edmund acknowledged he saw the daily cash balance, S 99, almost daily. Mr. Reiner testified that he was responsible for approving checks for E & R. There was a procedure where all checks were compared to bills and supporting documents. Two approvals were needed before a check could be issued. A list of checks, called a TC sheet, was prepared daily. E & R also had a cash requirement sheet which projected on a 4 week basis the bills to be paid and the accounts receivable. After a full trial Heaney was found not guilty of embezzling funds from E & R.

The Federal Government continued its investigation of Spanos and Carlson. Agents requested Heaney to disclose information concerning his involvement with Spanos and Carlson. Heaney advised he had no involvement with them. He and Malloy merely cashed checks with Carlson who operated a bar. When Heaney could give no assistance to the Government, an indictment was obtained against Heaney charging him with income tax evasion on the E & R checks written in his name. These were the same funds Heaney was found not guilty of embezzling in the State Court trial.

Alan Tunkavige, an investigator for the IRS testified before the Grand Jury that Heaney had endorsed a series of out of sequence checks of E & R. Some of these were also endorsed by William Carlson and John Spanos who were under investigation by the Government.

Tunkavige also testified about out of sequence checks issued to Donald Malloy of

E & R. He testified that it did not appear that Malloy had endorsed these checks. When questioned by the Grand Jury about the possibility of a handwriting analysis to determine who endorsed the checks, Tunkavige testified that a handwriting expert would not be able to determine who endorsed the checks because they did not have the originals and the microfilm copies were a problem.

Tunkavige further testified that he did not look at all the Malloy checks because Mally was dead, but rather, he relied on what the officers of E & R told him. Tunkavige further testified that Heaney would have an office clerk cash the checks for him.

A discovery order was entered requiring counsel to meet and review the Government file. Exculpatory information and the results of any tests were to be furnished to the defense. Defense counsel,

Russell, never met with the Government or reviewed the file. The Government instead forwarded selected items to Russell. No exculpatory material on reports were furnished. Russell requested the trial be adjourned from November 29, 1983, since he was on trial in another case. A trial date of January 3, 1984, was set. Russell requested another adjournment. The case was adjourned 1 day to January 4th.

The Federal trial began on January 4, 1984. The Government contended the E & R checks in Heaney's name were income to him which he did not report on his income tax return. The Government also contended that Heaney had personal and family expenses which he could not afford on his salary and he must have used E & R money. The Government presented the E & R checks which were out of sequence and payable to Heaney. The Government contended these checks were written without the knowledge or authorization of the E & R officers.

The Government deleted all the E & R checks which were out of sequence and payable to Malloy. None of these were submitted as evidence for the Judge and jury. There was no testimony about them. They were not provided to the defense prior to or during the trial.

The Government did not produce the E & R daily cash reports or the E & R bank statements which Judge Gaulkin noted at the State trial would support Heaney's defense that the E & R officers had knowledge of what he was doing and authorized it. The Government charged that Heaney had taken approximately $500,000 from E & R without authorization. Mr. Edmund testified without the documents that E & R was short approximately $300,000 on May 14, 1980. The bank statement from the State trial (S 102) had indicated a deficit of $12,060.91. The daily cash balance prepared by Mr. Gillen for May 14, 1980, (S 99) showed a balance of $131,884.96 which included deposits

and checks which had not yet cleared the bank. In summation, the Government attorney advised the jury the E & R account was overdrawn by $300,000 when Heaney left the Company. He stated that Heaney stole over $500,000 from the Company.

On cross-examination, Mr. Russell asked only a few questions concerning the daily meeting E & R held to determine the cash the company had in the checking account each day. Russell did not have the daily cash statement (S 99) which was used at the State trial or any other E & R statements to obtain specific testimony.

Russell did not cross-examine the Government witnesses on the amount of any claimed deficit of E & R on May 14, 1980. He did not have the bank statement from the State trial (S 102) which showed an overdraft of $12,060.91 for 1 day. Russell did not correct the record or summation when the witnesses and the Government attorney stated the account was

overdrawn $300,000 on May 14, 1980.

Russell asked only a few questions of Mr. Reiner of E & R concerning his investment of excess funds from the E & R checking account. Russell did not have the bank statements to cross-examine Mr. Reiner on his knowledge of the balances available for investment.

At the Federal trial, the Government made reference to personal expenses Heaney made for a family vacation, Christmas gifts and household furnishings. The Government also made reference to Heaney's purchase of a tavern in 1979 and a payment of $16,000 to Sadie Carlucci, the former owner of the tavern in April 1980. The Government also made reference to a payment of $5,000 Paul Heaney made to James Heaney in December 1979. The Government submitted over 200 exhibits at the January 1984 trial to detail the E & R checks which were written during the years 1978, 1979 and 1980. The Government also referred to checks Heaney

had written some 4, 5 and 6 years prior to the trial.

Heaney defended by showing the out of sequence checks were a plan devised by Edmund, Reiner and Malloy, the officers and owners of the company to generate cash to promote sales. He testified that he had funds from other sources to supplement his salary to pay for his personal and family expenses. He submitted Exhibit D 2 to show a loan of $12,000 from Mr. Bradly of E & R in December 1979. He submitted Exhibit D 3 to show a closing statement for the sale of property in May 1979 with proceeds of $13,206. He also submitted D 4 which was a letter from Mr. Edmund dated January 27, 1983, referring to property Heaney owned with other E & R officials.

Heaney submitted no other documents other than these 3 exhibits. He testified however, without documents, that he had collateral sources of funds during the years 1970 - 1982 from inheritances, family

loans and commercial loans. He also testified to the source of funds to purchase the bar some 4 years ago in December 1979. He testified that he had received money from E & R after he left the company to settle his accounts with them and to pay for his interest in a building which was leased by E & R from some E & R officers. The payment was also received in exchange for Heaney's agreement not to bring suit. No other witnesses were presented in Heaney's defense other than himself.

After the close of testimony and before summation, Heaney obtained by subpoena, a copy of a release between Edmund of E & R and Paul Heaney. It recited claims they had against each other. Heaney received $9,000 and agreed not to sue the company or the officers. Russell advised Heaney it was too late to submit the settlement agreement.

Heaney also obtained statements indicating payment of funds for the purchase

of the tavern in 1979. Again, Mr. Russell advised it was too late to submit the evidence.

In summation, the Government attorney told the jury that Heaney had no evidence to support his position; only 3 exhibits were submitted by Heaney. The Government attorney said there were no documents to support any of the claimed loans. There were no documents to support any of the inheritances. There was no proof to support any of the claims that Malloy was involved in the out of sequence checks. These defenses were figments of Heaney's imagination. He said the E & R account was overdrawn $300,000 on May 14, 1980, and Heaney stole $500,000 from E & R. He also said E & R did not pay any money to Heaney. He also questioned why Paul Heaney would pay $5,000 to his brother, James Heaney, in December 1979. He also questioned why Paul Heaney would pay $18,000 to Sadie Carlucci in April 1980.

He also raised questions with the jury as to the source of these funds.

Heaney was found guilty of the income tax evasion charges on January 10, 1984. On January 16, 1984, a Substitution of Attorney was signed by John Russell naming James Heaney as attorney for Paul Heaney. A motion for a new trial or evidentiary hearing was filed on the grounds of:

1. Ineffective assistance of Counsel
2. Failure of the Government to provide exculpatory material
3. Improper remarks to jury by the Government

1) Heaney claimed that Russell failed to devote sufficient time to the investigation and preparation of the case for trial. Specifically:

   a) Russell conferred with Heaney only one time on December 30, 1983, prior to the trial scheduled for January 4, 1984.

b) Russell did not review the State Court trial transcript.

c) Russell did not use evidence or testimony from the State trial which supported Heaney defense S99-S102.

d) Russell did not review the Government file as ordered by the Order for Discovery and Inspection.

e) Russell did not seek any exculpatory evidence from the Government.

f) Russell did not seek copies of any handwriting reports or analysis from the Government.

g) Russell did not obtain copies of the out-of-sequence checks to Mr. Malloy which supported Heaney's defense.

h) Russell did not obtain copies of the Checking Account of E & R

that the Government claimed Heaney used to wrongfully obtain money from the Company. Russell did not have the Checking Account to show that Mr. Reiner periodically made investment of excess funds in the account and that Reiner always knew the balance in the account.

i) Russell did not obtain copies of the E & R monthly cash requirements projections to show that Reiner always knew what bills were to be paid, what accounts receivable existed, and the extent of the Company's cash position.

j) Russell did not obtain copies of the E & R voucher packages to show that Mr. Reiner approved each of the in-sequence checks checks which were issued to

offset the out-of-sequence checks.

k) Russell did not interview any witnesses on behalf of Heaney.

l) Russell did not call William De Corso as a witness to testify that he cashed many of the out-of-sequence checks at the request of Paul Heaney and gave the proceeds to Mr. Malloy. Mr. De Corso submitted an Affidavit to confirm this. Mr. De Corso is the employee of E & R referred to in Mr. Tunkavage's grand jury testimony as cashing some of these checks at the request of Paul Heaney.

m) Russell did not introduce the agreement between Heaney and E & R which showed the settlement of their claims against each other and the payment of

$9,000 to Heaney by E & R in exchange for Heaney's agreement not to sue E & R and its officers.

n) Russell did not introduce the Closing Statement for the December 1979 purchase of the bar from Sadie Carlucci to show the payment and source of funds.

o) Russell did not prepare to introduce various documents proving collateral sources of funds to refute the Government's claim that Heaney had no other source of funds. Affidavits were submitted with documents showing funds Heaney obtained by loans and inheritances to support his motion for a new trial or evidentiary hearing. These should have been used at trial.

2) The Government failed to supply

exculpatory evidence:

a) 17 E & R checks out of sequence issued to Malloy.

b) The F.B.I report of Malloy's participation in the scheme to take money from E & R.

c) The F.B.I. investigation reports concerning Mr. De Corso cashing the out-of-sequence checks.

d) E & R bank statements including the Checking Accounts and the deposits, checks, and investment records for the account.

3. Improper remarks to the jury by the Government. The Government stated:

a) The E & R account was overdrawn by $300,000 on May 14, 1980. The Government knew from its review of the bank statement and S102 from the State trial that the account was overdrawn by only $12,060.91 on May 14th for a period of one

day when deposits covered the overdraft.

b) That E & R paid no money to Paul Heaney. In fact, Heaney and E & R agreed to settle their disputes and Heaney signed a Release of Claims against E & R and the officers in exchange for a net payment of $9,000.00.

c) That Paul Heaney did not have sufficient income to make a payment of $5,000 to his brother, James Heaney. In fact, the Government had the records and check documenting that the payment of $5,000 was repayment of a loan of $5,000 made by James Heaney to Paul heaney a few weeks prior to provide temporary funds for the purchase of the bar by Paul Heaney in December 1979. The Governent had obtained this check

when it subpoenaed James R. Heaney's checks for the Grand Jury.

d) That Paul Heaney did not receive any inheritances. In fact, the Government had records of inheritances received by Paul Heaney when it subpoenaed James Heaney's records for the Grand Jury.

In opposition to Heaney's motion, the Government submitted the Affidavit of trial counsel John Russell. He stated he was familiar with the case from the State Trial in which Heaney was acquitted. He had no expectation that E & R records would disclose involvement of Malloy or other E & R officers. Further, neither De Corso nor any other witnesses could support Heaney's defense.

Russell, however, never explained why he did not use the evidence from the State Trial, which was persuasive to Judge

Gaulkin that the E & R officers authorized the out-of-sequence checks. Russell never explained why he did not review the Government's file prior to the Federal Trial. Russell never explained why he did not obtain copies of the out-of-sequence E & R checks issued to Malloy.

The Government also submitted the Affidavit of Sadie Carlucci. She had sold the bar to Heaney in December 1979. She signed an Affidavit on January 30, 1984, stating she loaned $30,000 to Paul Heaney after the sale for renovations and he repaid $16,000 in March 1980. Further, she had advised a representative of the IRS of this loan and repayment.

Sadie Carlucci signed another Affidavit on March 26, 1984, which was submitted by the Government, which recanted the First Affidavit and stated she had not made a loan to Heaney. The payment of $16,000 in March 1980 was part of the cash

payment of $45,000 for the sale in December 1979. Sadie Carlucci's second Affidavit was contradicted by the Closing Statement which showed the cash payments and had attached copies of the checks paid to Sadie Carlucci on December 5, 1979. When Judge Debevoise questioned the Government on the statements in Sadie Carlucci's second Affidavit which was submitted by the Government, the Government attorney agreed that the payment of $16,000 was not explained, but it was probably some sort of under the table payment.

The Government also submitted an Affidavit of Elias Fahmie, dated April 3, 1984, in which he stated he loaned $20,000 to Paul Heaney during 1981 or 1982 to the best of his recollection and not in 1980 as Heaney claimed. No documents were submitted by the Government with Mr. Fahmie's Affidavit to help

clarify when the loan was made to Heaney, which was the point at issue.

The Government also submitted the Affidavit of Agent Tunkavige. He stated that during the investigation he reviewed several out-of-sequence E & R checks payable to Mr. Malloy. He compared the signature with Malloy's known signature, and it did not remotely resemble Malloy's signature. He concluded the Malloy signature was forged and resembled the known signature of Defendant Heaney. This Affidavit completely contradicted his testimony before the Grand Jury, in which he stated he had not looked at all the Malloy checks because Malloy was dead; rather, he relied on what the E & R officers told him. Further, a handwriting expert could not tell who endorsed the checks, because the originals could not be located and the microfilm copies were a problem.

Tunkavige did not explain whether the Government had an expert review these checks.

Heaney submitted an Affidavit showing the statements in the Government Affidavits of Tunkavige, Fahmie, and Carlucci were contradicted by other proofs.

Judge Debevoise denied Heaney's motion for a new trial or evidentiary hearing. He found Heaney's testimony was unbelievable. He found that defense counsel did the best he could, faced with overwhelming evidence. He found the Brady material was either known to the Defendant or in the possession of him or his attorney. He found the Malloy checks were inculpatory. He found the Government's closing argument was not improper. He also stated that it appeared that Defendant sought to obtain false

Affidavits from Sadie Carlucci and Elias Fahmie.

On Appeal, the Third Circuit affirmed the Trial Court without opinion. At oral argument one member of the panel asked whether a handwriting expert had ever reviewed the Malloy checks. No expert reviewed them on behalf of the Defendant, since they have been in the custody of the Government. Defense counsel did not review the Government's file. The Government did not furnish the defense with a handwriting report. Defendant's motion for rehearing by the Third Circuit was also denied.

Defendant requested permission to review the Government file to copy the out-of-sequence checks to Malloy and other exculpatory material and any handwriting reports. The Government refused this request. Motion was made to the Third Circuit for leave to inspect the

Government file for these exculpatory items. The motion was denied.

ARGUMENT

I

DUE PROCESS PROHIBITS GOVERNMENT FROM SUBMITTING EVIDENCE WHICH IS FALSE AND REQUIRED GOVERNMENT TO CORRECT THE RECORD WHEN FALSE EVIDENCE HAS BEEN SUBMITTED BY A GOVERNMENT WITNESS

The Government sought to prove that Heaney removed in excess of $500,000 from the E&R checking account without authorization and used this money for his own purposes. The best evidence of this should have been the checking account statements and the E&R records of cash. It was admitted by the E&R officers at the trial that a person other than Heaney prepared a daily statement of the cash position. The checking account statements themselves would have disclosed all the transactions in the account.

Despite the fact the Government submitted hundreds of items of evidence, these crucial documents were not offered for the consideration of the Judge or

jury, or the defendant for that matter. The reason for the Government's strategy is clear. At the State trial, the prosecutor did offer E & R cash reports (S99) and bank statements (S102) in evidence. The Trial Judge, on reviewing these exhibits, observed that if Heaney could show that critical people at E&R had access to these documents, it would support his defense that what he was doing was authorized. The cash position was prepared on a daily basis by E&R. On May 14, 1980, it was $131,884.96. The bank statement showed a deficit for May 14, 1980, of $12,060.91. It was obvious to the Judge that the E&R officers could easily compare the daily cash balance they reviewed in house each day with the bank statements. Any discrepancy would be obvious. The probative value of this evidence was not lost on the State jury either. It found the defendant not

guilty.

The amount of the overdraft itself was also significant. One week after Heaney left the company, an overdraft of $12,060.91 was reported. It was covered immediately by a large deposit the next day. It would be difficult to convince a jury that Heaney removed $500,000 from the company without authorization if the account was only overdrawn $12,060.91.

The Government in the Federal trial avoided these substantial pitfalls simply by keeping this evidence from the jury. Instead, the Government attorney, at page 58 of the transcript, merely asked Mr. Edmund if anything unusual happened to the E&R account on May 14, 1980. Edmund replied it was overdrawn. Edmund was then asked if he checked the E&R records to determine whether the account should have been overdrawn. He replied the records showed the balance

should have been about $275,000, and the bank was telling them they were minus $15,000. They were close to $300,000 in the hole. By simply permitting Edmund to testify without the documents, the Government avoided the disclosure of evidence which would support the defense, and it permitted the Government to take advantage of false and misleading testimony without detection. John Russell, defense attorney, had not obtained the evidence from the State trial. He had not reviewed the testimony. He could no longer remember the details of the State trial after the passage of more than two years' time. He could not and did not correct the record.

The U.S. Supreme Court has strongly condemned this practice in the Case of Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173 (1959), which also involved an application for Certiorari. Chief Justice

Warren stated at page 1177:

> "First, it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the 14th Amendment."
>
> "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears."

The Chief Justice noted this principle would apply even though the false testimony only went to the credibility of the witness, and stated further:

> "It is of no consequence that the falsehood bore upon the witness's credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and if it is in any way relevant to the case, the District Attorney has the responsibility and duty to correct what he knows to be false and elicit the truth."

The Chief Justice also noted that a prosecutor may not remain silent when

false testimony is provided by a Government witness and stated:

> "That the District Attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing as it did a trial that could in any real sense be termed fair."

In the Heaney Case, the Government attorney did not correct the record. Further, he did more damage than simply remaining silent. He compounded the false testimony. At page 393 of the transcript of his summation, he stated without qualification that on May 14, 1980, the bank called up E&R and told E&R the account was overdrawn by about $300,000. The Government attorney gave the false testimony the ring of authority.

The jury was misled from the testimony at the beginning of the trial right through to the summation that the E&R account was overdrawn by $300,000

when Heaney left the company.

The Chief Justice, in Napue, also noted the Supreme Court's duty to make its own independent examination of the record in due process cases. At page 1178:

> "The duty of this Court to make its own independent examination of the record when federal constutional deprivations are alleged is clear, resting as it does, on our solemn responsibility for maintaining the Constitution inviolate."

The Case of Giles v. Maryland, 386 U.S. 66, 87 S. Ct. 793 (1967) similarly involved the issues of suppression of evidence and the failure of the prosecutor to correct false evidence. The U.S. Supreme Court granted Certiorari and determined it was not necessary to address the broad question of the prosecutor's constitutional responsibility to disclose exculpatory evidence, but rather the Court cited and relied upon the principles previously expressed in

Napue v. Illinois. The Court noted that the testimony of a key Government witness was inconsistent with the facts as contained in a Police Report of the incident. At page 799, the Court stated:

> "Yet nothing appears in the trial transcript to show what, if any, action was taken by the prosecution to correct and explain the inconsistencies between the testimony of the state witnesses and the report."

The Giles Case has some other important features which are similar to the Heaney Case. In Giles, the Government refused to supply the Police Reports, claiming they were police work product. The Supreme Court ordered the production of the Police Reports in the defendant's application for post conviction relief and stated at page 797:

> "We now have evidence before us which neither Judge Morrman (evidentiary hearing) nor the Court of Appeals considered, which,

> in our view, justifies a remand to the Court of Appeals for its consideration whether that Court should order an inquiry to determine whether such a situation arose at petitioner's trial. The evidence consists of two Police Reports, not part of the record, which came to our attention when the State, at our request, supplied the material considered by the Trial Judge in imposing sentence."

At page 800, the Giles Court stated further:

> "In relying upon material not part of the record as a reason for remand, we follow our practice of noticing supervening matters in order to avoid deciding constitutional questions by allowing State Courts to take action which might dispose of the case."

The Government submitted a false affidavit of Sadie Carlucci to discredit Heaney. Rather than correct the record, the Government stated the payment of $16,000 was probably an under-the-table payment.

II

DUE PROCESS PROHIBITS GOVERNMENT FROM REFUSING TO DISCLOSE EVIDENCE WHICH IS PRIMA FACIE EXCULPATORY SOLELY ON ITS UNILATERAL DETERMINATION THAT THE EVIDENCE IS INCULPATORY

The Government sought to prove that Heaney, without the authorization or knowledge of the E&R officers, took money from E&R by use of the out-of-sequence checks. Heaney's defense was that the E&R officers devised and utilized the out-of-sequence checks to provide cash to promote sales. The Government's investigation of the out-of-sequence checks was triggered by the Government's discovery of some E&R checks payable to Heaney and Malloy, which were cashed at Mr. Carlson's bar. Malloy was the E&R Vice President for Sales. In fact, the F.B.I. advised Mr. Edmund, President of E&R, that Malloy was involved in the scheme to take several hundred thousand dollars

from E&R. (Mr. Edmunds' notes were Government Exhibit 3500B, page 63 Appendix.) According to Edmunds' notes, E&R could find nothing wrong, and he was aware of no E&R records missing. The F.B.I. called again on May 13, 1980, and arranged to visit E&R on May 14, 1980, to discuss the situation. By coincidence, the E&R checking account became overdrawn on May 14, 1980, in the amount of $12,060.91 for one day. It was immediately covered by a large deposit the next day.

E&R then did an internal review of its checking account, and the accountant reported the out-of-sequence checks.

A list of the out-of-sequence checks was prepared by Mr. Neil (pages 57 - 61 of Appendix), including the out-of-sequence checks issued to Donald Malloy. The list of these checks was furnished to the Government. The

Government prepared Exhibits 210A, 210B, and 210C, listing the out-of-sequence checks issued to Heaney. The Government intentionally deleted all reference to the out-of-sequence checks in the name of Malloy. None of these checks were furnished to the defense. They did not become part of the trial. The jury never learned of their existence.

The out-of-sequence checks in the name of Malloy were highly exculpatory. They documented Heaney's position that officers of E&R knew of the plan and participated in it. They tied in with the F.B.I. information that Malloy was involved. The Government obviously did not want these out-of-sequence checks to come to the attention of the jury. They would make the Government's proofs more difficult and complicated. The Government used the same strategy used in connection with the E&R bank

statements and daily cash reports. The Government acted as though these checks did not exist. Mr. Russell, defense counsel, did not review the Government file. He never mentioned the checks.

Defendant moved for a new trial or evidentiary hearing. One ground was the failure of the Government to disclose the Malloy checks and other exculpatory evidence. In response, the Government submitted Agent Tunkavige's Affidavit in which he stated he examined the Malloy checks and determined they had been forged by Heaney. The Government claimed the Malloy checks were inculpatory and there was no requirement to disclose them to the defense.

Tunkavige's Affidavit completely contradicted his previous testimony to the Grand Jury in which he testified that a handwriting expert could not determine who endorsed the Malloy checks,

because they were working with microfilm copies which were a problem. He had not looked at all the Malloy checks, because Malloy was dead. He was really relying on the E&R officers, who said it didn't look like Malloy endorsed the checks. There was no testimony at the Grand Jury that even suggested Heaney forged the Malloy checks.

The Order for discovery and inspection in the Heaney case required the Government to disclose all documents which were exculpatory under Brady v. Maryland. A procedure was provided for review by the Court if there was a dispute on disclosure. Since defense counsel never reviewed the Government's file, the question of the Malloy checks and other exculpatory material was not brought to the Court's attention. The Court never saw the Malloy checks. The Trial Court merely adopted the decision

of Agent Tunkavige, sign unseen, that the Malloy checks were forged by Heaney. There was no testimony at the trial or Grand Jury to support this non-expert opinion.

The U.S. Supreme Court has stated in Brady v. Maryland, 373 U.S. 83, 87 (1967) that:

> "The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."

The Government now says the exculpatory checks are inculpatory. Agent Tunkavige now says the signatures which could not previously be deciphered can be read, and it is a forgery by Heaney. All this manipulation is caused by the fact that the Government did not want to disclose the Malloy checks, which are prima facie

exculpatory, to the defendant and the jury.

Several Federal Courts have expressed the principle well. In Griffin v. U.S. 183 F.2d 990, 993 (D.C.Cir.1950), the Court said:

> "When there is substantial room for doubt, the prosecution is not to decide for the Court what is admissible or for the defense what is useful."

In U.S. v. De Marco, 407 F Supp. 107, 112 (C.D.Cal. 1975), the Court said:

> "The question is whether or not the documents could have been used by the defense to convince individuals that no admissions had been made by De Marco. This is a question for Judge and jury. By suppressing this evidence, Horowitz (prosecution) attempted to become the trier of fact. This is not the prosecutor's function. His duty is to provide exculpatory evidence to the defense and then seek to rebut it before the trier of the fact.

In Heaney's case, the Governmant also wants to be the trier of the fact.

Further, the Government wants to make sure that no one looks at the Malloy checks, not the defendant, the Jury or the Judge. Everyone is supposed to accept the Government's decision on this fact, sight unseen.

The U.S. Supreme Court has continued prosecution in this regard in the case of U.S. v. AGURS, 427 U.S. 97, 108, 96 S.Ct. 2392, 2399 (1976):

> "Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure." (emphasis supplied)

The Government's position in Heaney's case is doubtful. It must convince that the Malloy checks are not what they purport to be and that Heaney forged them. Tunkavige's reversal of his Grand Jury testimony is suspect. In addition, Tunkavige is not a

competent witness to testify to the authenticity of handwriting under Sec. 901(b) of the Rules of Evidence. He is a non-expert who acquired familiarity for the purpose of the litigation.

III

DUE PROCESS EXTENDS TO POST CONVICTION RELIEF APPLICATIONS AND REQUIRES THAT DEFENDANT HAVE THE OPPORTUNITY TO REVIEW GOVERNMENT FILE FOR EXCULPATORY EVIDENCE WHEN HIS TRIAL COUNSEL FAILED TO REVIEW GOVERNMENT FILE AND GOVERNMENT FAILED TO DISCLOSE ANY EXCULPATORY EVIDENCE AT THE PRE-TRIAL STAGE.

The argument in Points I and II highlight the need for limited discovery to permit defendant Heaney to enjoy the constitutional safeguards of due process and the protections implicit in Brady v. Maryland. Heaney's trial counsel never reviewed the Government's file. Appellate counsel is faced with the very real problem that the evidence to support the defendant's application for post conviction relief is not available to the Court for its consideration and, in fact, is in the exclusive possession of the Government.

It is respectfully submitted that this area has a procedural gap which impacts on numerous applications for post

conviction relief. The promulgation of a definitive procedure by the Supreme Court is necessary since the Statutory and Case law and Rules of Criminal Procedure are limited.

The American Bar Association Standards for Criminal Justice recognizes the need in this area. Standard 22-4.5 recommends that an effective procedure should be established for the production of documents in post conviction relief applications. It is noted that this discovery would be useful in resolving the need for evidentiary hearings.

Discovery has also been specifically provided in post conviction habeas corpus proceedings by 28 U.S.C. 225 and their rules. Judicial interpretation has liberalized the requirement of "custody" to permit these applications.

The Supreme Court in Giles v. Maryland, supra, granted certiorari and remanded the case for a determination of

whether the prosecution suppressed evidence or failed to convert false evidence, on the basis of evidence which was not part of the record but which was supplied by the state at the request of the Supreme Court.

In Giglio v. U.S., 405 U.S. 150, 92 S. Ct. 763 (1972) the Supreme Court noted that a new trial is not automatically required whenever a combing of the prosecutor's file after trial discloses evidence which is possibly useful to the defense, but not likely to have changed the verdict. The Court noted the evidence in question must be material.

As a practical matter, Due Process does not work and there are no checks and balances if a defendant in a criminal matter must rely on the Prosecutor's determination unilaterally and without review that the Government has not exculpatory information in its file. A

good faith mistaken belief of the Prosecution has the same effect of denying the defendant of a fair trial.

IV

EVALUATION OF THE EFFECTIVENESS OF DEFENSE COUNSEL REQUIRES OPPORTUNITY TO DEMONSTRATE THE EVIDENCE AVAILABLE BUT NOT USED BY HIM.

One of the grounds for defendant Heaney's motion for a new trial or evidentiary hearing was ineffective assistance of counsel. Heaney's defense to the charges was that the officers of E & R directed him to issue out-of-sequence checks to generate cash for their promotion of sales. The key to Heaney's defense was to show the officers knew the cash position of E & R and accounted for the proceeds of the out-of-sequence checks. This could be proven by effective cross-examination of the officers related directly to the E & R bank statements, the daily cash reports and the E & R procedures for the accounting for funds. The actual documents involved would be the basis for the testimony. This method was effective at the State

trial, even the Judge noted that the documents supported the defense if defendant could show that critical people had access to them.

Russell did not use this evidence from the State Court trial to cross-examine the E & R officers about their knowledge and daily involvement in the financial aspects of the company. Russell himself never obtained or reviewed the bank statements for the checking account Heaney was charged with using to obtain money from E & R. Examination of these statements would disclose that Mr. Reiner periodically invested extra cash from the checking account in short term investments to obtain interest on money that was not needed until the next week. In fact, Mr. Reiner testified on page 162 of the Transcript that he knew the balance on hand that was available for such use.

Reiner testified that he often called the banks to transfer money from the checking account. By effective use of the E & R bank statements, the daily cash balance reports and the investments of cash from the checking account Russell could have proven that the E & R officers always knew the cash position of the company, particularly as it was affected by the out-of-sequence checks.

It is impossible to evaluate Russell's efforts and lack of effort without review of the documents available to him which he neglected to use in Heaney's defense. Russell's lack of preparation, particularly concerning the documents, can only be measured and realized by analysis of the documents to determine the proofs theywould support.

This is particularly important with regard to the Malloy checks. Russell,

in Affidavit in opposition to Heaney's motion, merely stated that he had no expectation that any evidence of Malloy's involvement could be developed. But Russell never interviewed William DeCorso who would have told him that he, DeCorso, cashed a number of these checks at Heaney's request and gave the cash to Malloy. This is documented in DeCorso's affidavit. Further, Russell did nothing to pursue the question of the Malloy checks.

Failure to adequately investigage and prepare a defense may constitute ineffective assistance of counsel. Powell v. Alabama, 287 U.S. 45, 535 Ct. 55 (1932).

CONCLUSION

Defendant Heaney was denied his constitutional rights of due process and a fair trial with the effective assistance of counsel. He was not furnished with information in the possession of the Government which supported his defense.

Many of the claims defendant makes arise directly from the Government's failure to furnish information in its possession which the defendant claims was exculpatory. The Government claims the information was not exculpatory. There would be no prejudice to the Government's case if it had furnished the information at the outset. This would be so whether the information was exculpatory or not, provided it was all furnished. On the other hand, the defendant is severely prejudiced if the Government fails to supply information

under a mistaken belief that it is not exculpatory. Prejudice to the defendant is compounded when the Government refuses to permit inspection of its file to determine whether exculpatory evidence exists.

There is no prejudice to the Government if limited discovery is permitted under supervision of the Court to inspect for exculpatory evidence. Such discovery would assist the Court by providing a factual basis for determination of post conviction relief applications. This is particularly appropriate where, as here, defense counsel did not inspect the Government file at the pre-trial stage.

A definitive statement by the Supreme Court instructing prosecutors to furnish all information which might potentially be exculpatory would have far reaching benefits for persons charged with crimes. It would also

benefit the courts and government in the administration of justice.

A definitive statement by the Supreme Court requiring defense counsel to review the Government's file in detail would have similar far reaching benefits for persons charged with crime, as well as the Courts and the Government.

It is respectfully requested that the case be remanded for new trial, an evidentiary hearing or discovery.

Respectfully submitted,

James R. Heaney

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

U. S. Judge Debevoise

v. Criminal No. 83-241

PAUL HEANEY OPINION

April 23, 1984

I'm going to put an opinion on the record and then just be sure that everything is filed so that if this goes further, the Court of Appeals will have everything.

On January 10, 1984, after a four-day jury trial, defendant Paul J. Heaney was convicted of three counts of income tax evasion in connection with his 1978, 1979 and 1980 personal income tax returns. He had previously been acquitted in a New Jersey Superior Court trial on charges of embezzling funds of his former employer, Engineering and Refrigeration, Inc., which I will refer to as E&R. He was represented at both trials by John P. Russell, Esq.

The government's proofs showed that from 1975 through 1980 the defendant was controller of E&R and that during the periods 1978 through 1980 defendant embezzled about $500,000 from the company. The embezzlement was accomplished primarily by drawing out-of-sequence E&R checks against E&R's bank account and depositing these checks in defendant's own personal accounts. As evidence corroborating its other proof of embezzlement, the government showed the defendant made a number of extraordinarily large payments for his family and private business affairs, payments which could not have come from his own admitted income.

Defendant's defense was twofold. First he asserted that he did not embezzle these funds. In fact, according to him, the out-of-sequence checks were

part of a plan devised and supervised by E & R's executives designed to provide secret under-the-counter payments to unions and customers. Second, large personal payments were made possible by outside sources of funds, such as estate payments and loans.

I heard the testimony and the other evidence at the trial and concluded at that time that the government's witnesses were candid and completely truthful. I could not help but conclude that defendant was an unmitigated schemer and liar. Apparently the jury agreed.

Defendant has now moved pursuant to Rule 33 of the Federal Rules of Criminal Procedure for a new trial. Alternatively, he requests the Court hold an evidentiary hearing to determine whether a new trial is warranted. In essence, defendant asserts three grounds

that he alleges warrant a new trial. First, that he was denied effective assistance of counsel. Second, that the United States failed to comply with the Supreme Court's ruling in Brady v. Maryland, 373 U.S. 83 (1967). Finally, the prosecutorial misconduct warrants the granting of a new trial.

I have reviewed the papers which defendant has submitted in support of his motion, the papers which the government has submitted in opposition, and the reply papers submitted by defendant. I conclude that the motion is but a continuation of defendant's fraudulent posturing. It will be denied.

Effective Assistance of Counsel

The standard for effective assistance of counsel is the exercise of customary skill and knowledge which normally prevails at the time and place

Moore v. United States, 432 F. 2d 730 (3d Cir. 1970). To prevail upon a claim of ineffective assistance of counsel, a criminal defendant must demonstrate only that his attorney did not exhibit the customary skill and knowledge exhibited by criminal attorneys, but also, that the defendant was prejudiced by his attorney's shortcomings.

Defendant's affidavits and the affidavits of defendant's trial attorney are in conflict. However, I do not believe that the defendant has established either ineffective assistance of counsel or prejudice.

One difficulty defense counsel faced was that defendant's testimony at the state trial as to what he did with the out-of-sequence checks was at total variance with what his testimony was at the federal trial. His attempt

to explain one instance of testimony is unpersuasive in light of other portions of the State Court transcript. Documents which defendant asserts his attorney should have introduced would have served to impeach him.

Defendant asserts that his attorney failed to investigate and provide proof of the collateral sources of funds. To establish this point defendant appears to have solicited and filed a false affidavit of Sadie Carlucci that after a December 5, 1979, closing of the sale of her bar and grill to defendant, she loaned him $30,000. Defendant denies the Carlucci affidavit recanting the statements she made in her original affidavit are true. It would also appear that in December, 1983 defendant sought to obtain a false affidavit from Elias Fahmie, that he loaned defendant

$20,000 during 1980, and that barely a week ago defendant knew counsel, his brother James Heaney, sought to pressure Mr. Fahmie into signing such an affidavit.

These are only examples of the type of things which defendant now urges as a lack of effective assistance of counsel.

I observed Mr. Russell's conduct during motions prior to trial and during trial. Faced with overwhelming government proofs and a client who not only is incapable of telling the truth but whose lies differ from one proceeding to the next, Mr. Russell did all that reasonably could be done as defendant's attorney.

Brady Material

Defendant has cataloged a number of documents and items of alleged information which the government should

have turned over to him because they tend to exculpate him. Some are claims to support defendant's claim that he has outside sources of funds. Some are claims to support defendant's assertion that he wasn't stealing because E&R officials knew all about it.

I have reviewed each item referred to by defendant. All were either known to him or in possession of defendant and his attorney or existed only in defendant's imagination (for example, the Carlucci 1979 loan and the Fahmie 1980 loan), or was not information known to the government or were inculpatory rather than exculpatory. An example of the latter category of documents were the several out-of-sequence checks payable to E&R Vice-President Malloy and endorsed by him. Upon comparison, the signature on at least some of those checks reporting to be

those of Malloy were not his and might well have been those of defendant.

Improper Closing Argument

I have reviewed the portions of the government's closing argument which defendant claims to be prejudicial. In the first place, no objection was made at the time. Even if such objection had been made, I believe it was proper argument and not in conflict with facts known to the government.

The government's attorneys are requested to prepare a form of order denying defendant's motion for a new trial and for an evidentiary hearing.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

U. S. Hon. Dickinson R. Debevoise

v. Criminal No. 83-241

PAUL HEANEY ORDER

April 27, 1984

This matter having been opened to the Court by James R. Heaney, attorney for the defendant Paul J. Heaney, in the District of New Jersey (Special Attorney Leopold Laufer appearing) for an Order granting the defendant a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, or alternatively for an evidentiary hearing to determine whether a new trial is warranted, and the Court having heard Argument on April 23, 1984, and the Court having considered affidavits and all other papers submitted, and having rendered a bench opinion

IT IS on this 26th day of April, 1984

ORDERED that the motion be denied in all respects.

s/Dickinson R. Debevoise

Dickinson R. Debevoise
United States District
Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

U. S.

v.

PAUL HEANEY

Judge Debevoise
Criminal No. 83-241
Reconsideration Denied
May 7, 1984

I have reviewed your May 3, 1984, letter asking that I reconsider my decision to deny defendant's motion for a new trial or evidentiary hearing. I conclude that the motion was properly denied and your application for reconsideration will therefore be denied.

Very truly yours,

s/Dickinson R. Debevoise

Dickinson R. Debevoise
U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

U.S.

v.

PAUL HEANEY

Judge Debevoise

Criminal No. 83-241

SENTENCE

May 14, 1984

I've reviewed the probation report and, of course, I heard the trial in this matter. I've taken into account the remarks of the government, the remarks of James Heaney.

I appreciate the tragic effect this has on Mr. Paul Heaney's family. I -- which makes it doubly difficult to sentence in this case. And I appreciate the economic conditions of the family are desperate, to say the least.

Nevertheless, I find this is a case where a custodial sentence is required. The offense, itself, is a serious one. Evasion of taxes over a period of time.

And equally significant is the fact that I think on the basis of my hearing

the testimony and receiving the evidence and hearing the witnesses, that Mr. Heaney was not telling the truth on the stand. What he testified to was just unbelievable and riddled with contradictions which other witnesses and documents clearly refuted.

Every defendant has a right to insist upon a trial and to require the government to prove his guilt beyond a reasonable doubt. The defendant does not have a right to get on the stand and commit perjury before the jury. That is a factor which I take into account.

I'm going to impose a custodial sentence. The government has requested that I require execution of the sentence forthwith, but I will permit Mr. Heaney to be released on bail should he take an appeal pending review of the case by the Court of Appeals.

The sentence will be it is adjudged the defendant is hereby committed to the

custody of the Attorney General or an authorized representative for a term of two years on Count 1.

And Count 2. The defendant is committed to the custody of the Attorney General or its authorized representative for a term of two years to run concurrently with Count 1.

And Count 3. The defendant is committed to the custody of the Attorney General for a period of two years. The execution of the sentence as to imprisonment on Count 3 is suspended.

The defendant is placed on probation for a period of three years. And this probation is to begin upon the termination of the defendant's two-year period of imprisonment.

I have given the reasons for this sentence. I would advise, Mr. Heaney, you have a right to an appeal.

Notice of Appeal should be filed

within ten days. If you are unable to afford counsel for the purpose of the appeal, the Court -- the Clerk of the Court will file a Notice of Appeal on your behalf.

All right. I think that concludes the matter.

Bail will be continued. I guess it is personal recognizance.

MR. HEANEY: Yes, it is a personal recognizance. $30,000, your Honor.

THE COURT: Yes. That will be continued.

Anything else?

MR. LAUFER: No, sir.

THE COURT: All right. Thank you very much.

UNITED STATES COURT OF APPEALS
3rd CIRCUIT

U. S. No. 84-5336

v. Judgment Order

PAUL HEANEY January 29, 1985

After considering the contentions raised by appellant, to wit, that the court erred:

1) when it denied defendant's motion for new trial on the grounds of ineffective assistance of counsel;

2) when it denied defendant's motion for a new trial on the grounds that the government failed to disclose exculpatory evidence;

3) when it denied defendant's motion for a new trial on the grounds of improper remarks by the government's attorney to the jury;

4) when it denied defendant's motion for a new trial on the grounds that the out-of-sequence checks issued to Donald Malloy were exculpatory,

It is ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

UNITED STATES COURT OF APPEALS
3rd Circuit

U. S. No. 84-5336

v. ORDER

PAUL HEANEY February 26, 1985

The petition for rehearing filed by APPELLANT in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

UNITED STATES COURT OF APPEALS
3rd CIRCUIT

U. S. No. 84-5336

v. ORDER

PAUL HEANEY March 14, 1985

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until April 27, 1985.

UNITED STATES COURT OF APPEALS
3rd Circuit

U. S. No. 84-5336

v. ORDER

PAUL HEANEY April 19, 1985

Motion by appellant for leave to review Government's file for exculpatory evidence and for continued stay of mandate. The foregoing motion is denied.

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION

5TH AMENDMENT (DUE PROCESS)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

6TH AMENDMENT (EFFECTIVE ASSISTANCE OF COUNSEL)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.